

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

OCTOBER TERM, 1900.

No. 1027.

44

HUGH HARTEN AND JULIA HARTEN, HIS WIFE,
APPELLANTS,

v's.

THE BRIGHTWOOD RAILWAY COMPANY, A CORPORATION,
AND THE WASHINGTON, WOODSIDE AND FOREST
GLEN RAILWAY AND POWER COMPANY OF
MONTGOMERY COUNTY, MARYLAND, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED OCTOBER 24, 1900.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1900.

No. 1027.

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APPELLANTS,

vs.

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GLEN RAILWAY AND POWER COMPANY OF
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In the Court of Appeals of the District of Columbia

HUGH HARTEN ET UX., Appellants,
vs.
THE BRIGHTWOOD RAILWAY CO. ET AL. } No. 1027.

a Supreme Court of the District of Columbia.

HUGH HARTEN ET AL.
vs.
THE BRIGHTWOOD RAILWAY COMPANY, a Corporation, et al. } No. 42449. At Law.

UNITED STATES OF AMERICA, } ss:
District of Columbia,

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 Declaration.

Filed Sep. 14, 1898.

In the Supreme Court of the District of Columbia.

HUGH HARTEN and JULIA HARTEN, His
Wife, Plaintiffs,
vs.
THE BRIGHTWOOD RAILWAY COMPANY, a Body
Corporate, and The Washington, Woodside
and Forest Glen Railway and Power Com-
pany of Montgomery County, Maryland, a
Body Corporate, Defendants. } At Law. No. 42449.

The plaintiffs, Hugh Harten and Julia Harten, his wife, sue the defendants, The Brightwood Railway Company, a body corporate under and by virtue of the laws of the United States and doing business in the District of Columbia, and The Washington, Woodside and Forest Glen Railway and Power Company of Montgomery County, Maryland, a body corporate under and by virtue of the laws of the State of Maryland and doing business in the District of Columbia, for that whereas heretofore, to wit, on the 31st day of July, 1898, and for a long time prior thereto the said defendant, The Brightwood Railway Company, owned, controlled, operated, and

used, as a common carrier of passengers for hire, certain cars propelled and run by means of electricity on the trolley system on Brightwood road or Seventh street extended, in the

2 District of Columbia, outside of the corporate limits of the city of Washington, in said District, upon certain tracks then and there laid and existing; and the said defendant, The Washington, Woodside and Forest Glen Railway and Power Company, on the day and year aforesaid, to wit, on the 31st day of July, 1898, and for a long time prior thereto, owned, controlled, operated, and used, as a common carrier of passengers for hire, along said Brightwood road or Seventh street extended, in said District of Columbia, outside of the corporate limits of said city of Washington, in said District, certain cars propelled and run by means of electricity, by what is known as the trolley system, and the cars of the said defendants on the day and year aforesaid and for a long time prior thereto were run, managed, operated, and controlled through the officers, agents, employees, and servants of the said respective defendants by means of the said electric system; and the said plaintiffs say that it was the duty and obligation of the said defendants, their officers, agents, employees, and servants, to so operate, manage, control, and cause cars of the said defendants to run and move that injury should not result to passengers on the cars of the said defendants and passengers leaving said cars and required, in order to reach their residence, to pass over tracks used by the said defendant companies and each of them; and the plaintiffs further say that it was further the duty of the said defendant, The Washington, Woodside and Forest Glen Railway and Power Company, its officers, agents, employees, and servants, when said latter company, its officers, agents, employees, and servants, stopped and caused to stop a car of the said last-named defendant to let off a passenger therefrom, and a car on a reverse course was about to pass, to the knowledge of the said last-named defendant, its officers, agents, employees,

3 and servants, to caution such passengers so being let off of the approach of said car on such reverse course in such manner as was reasonably calculated to avoid the possibility of injury to such passenger; and the plaintiffs further say that it was the duty and obligation of the said defendant, The Brightwood Railway Company, its officers, agents, employees, and servants, when running, operating, and causing to move its said cars, and when cars are approaching and moving in an opposite direction and stop to let off passengers, to warn and give notice to passengers on the said car so stopping, as aforesaid, of its approach by caution and noticeable signals of its said approach; and the plaintiffs further say that the said plaintiff, Julia Harten, on the 31st day of July, 1898, was a passenger on a certain car run, operated, controlled, and managed by the said defendant, The Washington, Woodside and Forest Glen Railway and Power Company, on said Seventh street extended or Brightwood road, in the District of Columbia, outside of the limits of said city of Washington, in said District, at a point on said street

extended or Brightwood road, about one hundred and fifty yards north of a public road, to wit, Piney Branch road, in which said car the said defendant last aforesaid had undertaken to carry the said plaintiff, Julia Harten, and which said car was then and there controlled and operated by the said last-named defendant, its officers, agents, employees, and servants, and said car then and there stopped and was caused to stop for the purpose of allowing passengers, including said plaintiff, Julia Harten, to alight therefrom, and the said plaintiff thereupon got off of said car and proceeded to pass around the rear thereof in order to cross the south-bound track laid

4 and existing on said road or street extended, as aforesaid, at the point aforesaid, and upon which said track the cars of the said defendants and each of them moved over, along, and upon the same when going in a southerly direction towards the said city of Washington, to reach her residence, and after passing safely around and by the rear of said car, from which the said female plaintiff had gotten off as a passenger, and while in the act of stepping upon said adjoining track, and without any notice to her or caution or signal from the said defendants, their officers, agents, employees, or servants, of the approach of said car on the said southern-bound track, which said car was owned, controlled, operated, used, and managed by the said defendant, The Brightwood Railway Company, its officers, agents, employees, and servants, and without knowledge on the part of the said female plaintiff of the approach of said car on said adjacent or south-bound track, and without want of due care on her part, the said female plaintiff was, through the carelessness and negligence of said defendants, struck by the said approaching car of the said defendant, The Brightwood Railway Company, which was then and there moving at a fast and unlawful and careless and negligent rate of speed, and thrown and caused to fall upon the fender of said car last aforesaid, and was carried and conveyed on said fender, before said car was caused to stop, for a long distance, to wit, the distance of one hundred feet, and in consequence of so being struck by the car of the said defendant, The Brightwood Railway Company, the said female plaintiff was bruised, hurt, and wounded, and in consequence whereof, from the time of such occurrence until the present time, she has suffered great pain and anguish, and will henceforth so continue to suffer great pain and anguish, and has ever since been sick, sore, lame, and disordered, and

5 her nervous system was and is permanently injured, and her right leg was fractured, broken, and hurt near the ankle thereof and was and is also permanently injured, and by reason of said injuries aforesaid the said right leg of the plaintiff, Julia Harten, was caused to be put and placed in plaster of Paris a long space of time, to wit, for the period of thirty days, all to the damage of the plaintiffs in the sum of ten thousand dollars; wherefore they bring suit.

And the plaintiffs claim of the defendants the sum of ten thousand dollars and costs of this suit.

Second count. The plaintiffs further sue the defendants, bodies

corporate and doing business in the District of Columbia, for that the said female plaintiff, on the 31st day of July, 1898, was a passenger on the car of the said defendant, The Washington, Woodside and Forest Glen Railway and Power Company, northward bound, and the said female plaintiff desiring to alight therefrom, the said car was caused to stop at a point near the residence of the plaintiffs on Seventh street extended or Brightwood road, in that part of the District of Columbia outside of the corporate limits of the city of Washington, in said District, about one hundred and fifty yards north of a public road, to wit, Piney Branch road, and the said female plaintiff thereupon got off of said car and proceeded around the rear thereof to cross and pass over to the west of the south-bound track used by the defendants for the purpose of running their cars thereon, and while in the act of so passing over, and when the said female plaintiff had reached the said track, she was violently struck by a car of the defendant The Brightwood Railway Company, and thrown on the fender attached to the said car of the said Brightwood Railway Company and

6 carried a considerable distance before said car was stopped and brought to a standstill, which said accident to the female plaintiff was caused by carelessness and negligence on the part of the said defendants in not cautioning and warning the said female plaintiff by such proper and reasonable signals as would reasonably have calculated to avoid the possibility of injury to said plaintiff, which said duty and obligation was imposed upon the said defendants as common carriers of passengers for hire; and the said plaintiffs further say that the said car of the said defendant company which struck the plaintiff was at the time of said accident moving at a fast, unlawful, and negligent rate of speed, and the plaintiffs say that the said female plaintiff was, without any fault on her part, but by so being struck by the said car of the said defendant, The Brightwood Railway Company, bruised, hurt, and wounded, and in consequence whereof, from the time of such occurrence until the present time, she has suffered great pain and anguish and will henceforth so to continue to suffer great pain and anguish, and was and has ever since been sick, sore, lame, and disordered, and her nervous system was and is permanently injured, and her right leg was fractured, broken, and hurt near the ankle thereof and was and is also permanently injured, and by reason of such injuries aforesaid the said right leg of the plaintiff, Julia Harten, was caused to be put and placed in plaster of Paris for a long space of time, to wit, for the period of thirty days, all to the damage of the plaintiffs in the sum of ten thousand dollars; wherefore they bring suit.

And the plaintiffs claim of the defendants the sum of ten thousand dollars and costs of this suit.

CHAS. BENDHEIM,
EDWIN FORREST,
Attorneys for Plaintiffs.

7 The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

CHAS. BENDHEIM,
EDWIN FORREST,
Attorneys for Plaintiffs.

Pleas of the Brightwood Railway Co.

Filed Oct. 6, 1898.

In the Supreme Court of the District of Columbia.

HUGH HARTEN and JULIA HARTEN, His	}	At Law. No. 42449.
Wife,		
vs.		
THE BRIGHTWOOD RAILWAY COMPANY and		
The Washington, Woodside and Forest		
Glen Railway and Power Company.		

Pleas of the defendant The Brightwood Railway Company.

For pleas this defendant says:

(1.) For plea to the first count of the declaration, this defendant says it is not guilty as alleged.

(2.) For plea to the second count of the declaration, this defendant says it is not guilty as alleged.

GORDON & GORDON,
Attorneys for the Defendant.

8 *Pleas of Washington, Woodside, and Forest Glen Railway & Power Co.*

Filed Oct. 6, 1898.

In the Supreme Court of the District of Columbia

HUGH HARTEN and JULIA HARTEN, His	}	At Law. No. 42449.
Wife,		
vs.		
THE BRIGHTWOOD RAILWAY COMPANY and		
The Washington, Woodside and Forest		
Glen Railway and Power Company.		

Pleas of the defendant The Washington, Woodside and Forest Glen Railway and Power Company.

For pleas this defendant says:

(1.) For plea to the first count of the declaration, this defendant says it is not guilty as alleged.

(2.) For plea to the second count of the declaration, this defendant says it is not guilty as alleged.

GORDON & GORDON,
Attorneys for the Defendant.

9 *Joinder in Issue on Pleas of the Brightwood Railway Company.*

Filed Oct. 14, 1898.

In the Supreme Court of the District of Columbia.

HUGH HARTEN and JULIA HARTEN, His	}	At Law. No. 42449.
Wife,		
<i>vs.</i>		
THE BRIGHTWOOD RAILWAY COMPANY and		
The Washington, Woodside and Forest		
Glen Railway and Power Company.		

The plaintiffs join issue upon each and every one of the defendant's, The Brightwood Railway Company, pleas herein filed.

CHAS. BENDHEIM,
EDWIN FORREST,
Attorneys for Plaintiffs.

Joinder in Issue on Pleas of the Washington, Woodside and Forest Glen Railway Company.

Filed Oct. 14, 1898.

HUGH HARTEN and JULIA HARTEN, His	}	At Law. No. 42449.
Wife,		
<i>vs.</i>		
THE BRIGHTWOOD RAILWAY COMPANY and		
The Washington, Woodside and Forest		
Glen Railway and Power Company.		

10 The plaintiffs join issue upon each and every one of the defendant's, The Washington, Woodside and Forest Glen Railway and Power Company, pleas herein filed.

CHAS. BENDHEIM,
EDWIN FORREST,
Attorneys for Plaintiffs.

Memorandum.

June 11, 1900.—Verdict for defendants.

Supreme Court of the District of Columbia.

WEDNESDAY, June 27, 1900.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * *

The following case was tried before Justice Cole:

HUGH HARTEN and JULIA HARTEN, His Wife,	}	At Law. No. 42449.
Plaintiffs,		
vs.		
THE BRIGHTWOOD RAILWAY COMPANY and	}	
The Washington, Woodside and Forest		
Glen Railway and Power Company of Mont-		
gomery County, Maryland, Defendants.		

11 Upon hearing the plaintiffs' motion for a new trial, it is considered that the same be, and hereby is, overruled and judgment on verdict ordered. Therefore it is considered that the plaintiffs take nothing by their suit, and that the defendants go thereof without day and recover against the plaintiffs their costs of defense, to be taxed by the clerk, and have execution thereof.

Appeal to Court of Appeals noted by the plaintiffs.

Appeal and Request for Citation.

Filed Jul- 2, 1900.

In the Supreme Court of the District of Columbia.

HUGH HARTEN and JULIA HARTEN	}	At Law. No. 42449.
vs.		
THE BRIGHTWOOD RAILWAY CO. ET AL.		

And now come the plaintiffs and enter an appeal to the Court of Appeals of the District of Columbia from the judgment rendered herein on the 27th day of June, 1900, and the clerk of the court is requested to issue citation to said defendants, as required by law, on this appeal.

CHAS. BENDHEIM,
EDWIN FORREST,
Att'ys for Plaintiffs.

12 In the Supreme Court of the District of Columbia.

HUGH HARTEN and JULIA HARTEN, His Wife,	}	At Law. No. 42449.
vs.		
THE BRIGHTWOOD RAILWAY COMPANY and	}	
The Washington, Woodside and Forest		
Glen Railway and Power Company of		
Montgomery County, Maryland.		

The President of the United States to the Brightwood Railway Company, a corporation, and the Washington, Woodside and Forest Glen Railway and Power Company of Montgomery County, Maryland, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the

cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 2d day of July, 1900, wherein Hugh Harten and Julia Harten, his wife, are appellants and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, Chief Justice of the supreme court of the District of Columbia, this second day of July, in the year of our Lord one thousand nine hundred (1900).

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 3d day of July, 1900.

J. J. DARLINGTON,

Att'y for Wash., Woodside & Forest

Glen Railway & Power Co.

D. W. BAKER,

Att'y for the Brightwood Railway Company.

13 Supreme Court of the District of Columbia.

MONDAY, July 2, 1900.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * *

HUGH HARTEN ET UX., Pl'ffs,	} At Law. No. 42449.
<i>v.</i>	
THE BRIGHTWOOD RAILWAY CO. ET AL., Def'ts.	

Now come here the plaintiffs, by their attorneys, and submit to the court their bill of exceptions, which is taken under consideration.

Memorandum.

July 12, 1900—Appeal bond filed.

14 *Order Extending Time for Filing Transcript.*

Filed Aug. 16, 1900.

In the Supreme Court of the District of Columbia.

HUGH HARTEN ET AL.	} At Law. No. 42449.
<i>vs.</i>	
THE BRIGHTWOOD RAILWAY COMPANY ET AL.	

For special and sufficient cause shown to the court and on application of the attorneys for the plaintiffs, it is this 16th day of August,

1900, by the court ordered that the time for producing and filing with the clerk of the Court of Appeals of the District of Columbia a transcript of the record in this cause by the plaintiffs be, and the same hereby is, extended until Tuesday, the second day of October, 1900.

HARRY M. CLABAUGH, *Justice*.

Order Extending Time for Filing Transcript.

Filed Oct. 1, 1900.

In the Supreme Court of the District of Columbia.

HUGH HARTEN ET AL.	}	At Law. No. 42449.
<i>vs.</i>		
THE BRIGHTWOOD RAILWAY CO. ET AL.		

15 For special and sufficient cause shown to the court and on application of the attorneys for the plaintiffs it is this 1st day of October, 1900, by the court ordered that the time for producing and filing with the clerk of the Court of Appeals of the District of Columbia a transcript of the record in this cause by the plaintiffs be, and the same hereby is, extended until Monday, October 15th, 1900, and that the term of court is also extended for ten days for the signing of the bill of exceptions.

CHAS. C. COLE, *Justice*.

Satisfactory.

J. J. DARLINGTON, *Att'y, &c.*

Supreme Court of the District of Columbia, October 8, 1900, Justice Cole Presiding.

HUGH HARTEN ET UX., Pl'ffs,	}	At Law. No. 42449.
<i>v.</i>		
THE BRIGHTWOOD RAILWAY CO. ET AL., Def'ts.		

Now again come here the plaintiffs, by their attorney, and pray the court to sign the bill of exceptions heretofore submitted for its consideration, taken during the trial of this cause, which bill is signed, sealed, and made part of the record, now for then.

Plaintiffs' Bill of Exceptions.

Filed Oct. 8, 1900.

In the Supreme Court of the District of Columbia.

HUGH HARTEN and JULIA HARTEN, His
Wife,
vs.

THE BRIGHTWOOD RAILWAY COMPANY and
The Washington, Woodside and Forest
Glen Railway and Power Company of
Montgomery County, Maryland.

At Law. No. 42449.

Be it remembered that at the trial of this cause, before the Hon. Charles C. Cole and a jury regularly impanelled and sworn to try the issues pending between the plaintiffs and the defendants, the plaintiffs, to maintain and prove the issues upon their part joined, offered and gave to the court and jury the following testimony, and no other testimony was offered or given at the trial of said cause:

The plaintiffs, to maintain and prove the issues upon their part joined, introduced and had sworn as a witness on their behalf the plaintiff JULIA HARTEN, who testified that her full name was Julia Harten; that she was married, and her husband's name is Hugh Harten; that she resides at Brightwood, Seventh Street road, in the county of Washington, District of Columbia, about three or four miles from the city, and has resided there for three years this last May at the same place; that her residence is on the west side of the road, right on the side of it, and on the 31st day of July, 1898, she got on a car of the defendant The Woodside and Forest Glen Rail-
17 way and Power Company on Seventh street, at the boundary of the city, close to ten o'clock a. m.; that she went in the car and took a seat on the second seat from the rear part of the car and on the west side of it; that she knew the conductor on the car that she got on by sight, but forgets his name; that he knew her by seeing her on the car for the last three years; that before getting on the car this morning she had been in the habit of riding on the car; that the car stopped to let her off right opposite her house; that it is in the habit of stopping there, and it stops to let off any passengers and it stopped to let her off; that after it stopped she got off of the car, and in getting off she said to the conductor that it was going to be a warm day; that no other conversation passed between them; that after getting off the car she went to pass around the rear part of the car to go over to her home; that in getting off the car she got off on the east side; that there was no sidewalk or anything like that there on that side, nor did anybody live there; that the conductor of the car knew where she lived; that in getting off the car she just walked around the car. She was asked, "Which way did you look?" and she answered, "I looked south or north—I looked

north ; " and she further says that she did not see any car coming ; that she went to pass over and the fender struck her and knocked her on the fender, and that is all that she knows of it ; that when the fender struck her her foot had just got on the east rail of the track ; that when she looked she was passing from behind the car and she looked up and did not see any car, made another step, and the car struck her, and she does not know any more about it ; doesn't remem-

ber any more, as she was rendered unconscious ; that she does
18 not know how far the car took her, and when she came to consciousness she was in her own house ; that prior to the car striking her she did not hear any bells or signals from any car nor any warning or hollering ; that while sitting in the car and before she got off she did not see any cars coming down on the other track ; that by reason of the accident her leg was broken and her arm hurt ; that it was her right leg, and the elbow of her arm was hurt, and it has left her in a tremor ever since, and she has been troubled with that tremor in her hand and in her arm all the time ; that by reason of her broken limb she was confined about eight weeks to her bed, and during that time the leg was in plaster of Paris ; that she was not able to walk around or use it, and suffered right smart pain and anguish ; that Dr. Ford Thompson and Dr. Darling attended her ; that Dr. Thompson attended her for about eight weeks and Dr. Darling for eight or nine months ; that the injury to her limb hurts her all the time ; that it is weak right around the knee and right around the ankle ; that the limb was broken about three or four inches below the knee-cap ; that she had to use two crutches for three months and one for four months, and that was after she got up from bed ; that when she was hit by the car she does not know what hit her or what part of her body was hit ; that no one was with her at the time of the accident, and she knew no one on the car besides the conductor ; that she does not know how fast or how slow the Brightwood car was approaching.

And thereupon on cross-examination the said witness testified that she moved out there in 1895 ; knew the conductor by eyesight on the car, and became acquainted with him by speaking to him, by
riding up and down on the car ; that she rode on the car.
19 every Sunday morning, not with him especially, but on the cars, and had been riding on the road every Sunday morning for three years before the accident and been riding also sometimes during the week ; that she was pretty familiar with the cars and the road ; that the Government cemetery indicated upon a map shown her she can see from her house, and it is about a half a square from it ; that she can see a right smart distance beyond the cemetery from her house, two or three hundred yards ; that ever since she has been living out there there has always been a double track and she knew that cars were going up and down on the west track as well as on the east one ; that when she got off the Woodside car she got off on the east side and she took a reasonable time to get across ; that she waited until the Woodside car started off and then she

started across; that she waited until the car started off before she undertook to cross.

Q. Now, was there anything to prevent your looking up from this point, three or four hundred yards up here, if you had tried? A. Well, I looked and I didn't see a car coming.

Q. You said you looked just before you stepped on. Was there anything to prevent your looking from the east side, here, while you were waiting up here (indicating)? A. I couldn't see up that way with a closed car.

Q. You could not? A. No, sir.

Q. Now, you stood here and the car stood about here (indicating)? A. Yes, sir.

Q. And you could not see away up here (indicating)? A. No, sir; because it was right down in the ditch.

20 Q. What was in the ditch? A. I had to step down into a ditch. There was no sidewalk.

Q. How deep was the ditch? A. It was just a step, like that (indicating).

Q. It was not deep enough to prevent your view up this road, was it? You could stand here and look up this road if you wanted to, could you not? A. I looked from behind the car.

Q. You say you looked from behind the car, but my question is, When you got off this car here and were standing on the east side, waiting for the Woodside car to move on, whether you could not have looked up here, if you had thought about it or cared about it? You could, could you not?

(The witness did not immediately answer.)

Q. I do not want to embarrass you at all. Have you any doubt that you could see up this road? A. I couldn't see with the closed car over me.

Q. With the car over you? A. Yes, sir.

Q. I do not quite understand that. How was the car over you? A. I was standing down here, and the big car was standing up here (indicating).

Q. Just take your seat. I will not make you stand any longer. About how long was this Woodside car? A. It is a right good distance; I don't know how long it is.

Q. The usual length of a car? A. Yes, sir.

21 Q. Thirty feet, or something like that? A. Yes, sir.

Q. Now, suppose the platform you are sitting on was the car; you were standing out here, were you? A. Yes, sir.

Q. And that car ran along twenty-five or thirty feet. Now, what was to prevent your looking out beyond the car if you had wanted to; do you know anything? A. Why, the car obstructed my view.

Q. Yes, but the car was only twenty-five or thirty feet long. A. Yes, but the fence was right there, almost up against the car.

Q. The fence? A. Yes, sir.

Q. What fence? A. Mr. Danvers' fence.

Q. Was that fence west of you or east of you? A. East; right behind me when I got off the car.

Q. The fence behind you could not prevent your looking up the west track, could it? A. I don't think I could have seen it very well.

Q. Do you think the fence behind you would have kept you from seeing? You do not mean the fence behind you kept you from looking up the road, do you? A. I couldn't see with the big car right up alongside me. When I was standing down here, in the rear part of the car, and the car was up here I couldn't see up.

Q. If there was any obstruction there to keep you from looking up the road just tell us what it was, and, if not, we will pass
22 on from that. Was there any obstruction to keep you from looking up the road if you had tried?

(The witness did not answer.)

Q. It was a clear road, was it not? A. I looked when I got off the car, and I didn't see no car, and I looked when I came from behind the car, and I didn't see none.

Q. Now, you say you waited until the Woodside car moved off?
A. Yes, sir.

Q. Then you did not run across the track, did you? A. No, sir.

Q. You walked slowly and deliberately? A. Yes, sir.

Q. How far had the Woodside car moved off before you began to cross the track? How far had it gotten from you? A. Well, not so very far.

Q. About how far would you say? A. About a couple of feet.

Q. And then you walked across that track and got in the space between the two tracks. About how wide is that? A. Between the two tracks?

Q. The space between the two tracks. A. About four feet.

Q. And when you got there you knew that there might be a car coming down on the other side, and looked for it, did you not? A. I looked and I didn't see none.

Q. Where were you standing when you looked? A. Just right on the track.

Q. On which track? A. Getting off on the east side track.

23 Q. You were on the east side track? A. Yes, sir.

Q. And the Woodside car had then gone on beyond you?
A. Yes, sir.

Q. And you looked up the track to see if the other car was coming? A. Yes, sir.

Q. You were thinking about it; you knew that another car might be coming, and so you looked for it. Now, can you tell us why you did not see it?

(The witness did not answer.)

Q. I do not want to ask you any hard questions or unfair questions, but can you tell us why you could not see that car? A. Why

the car was coming at such a quick rate, I guess I couldn't very well get out of the way, I reckon.

Q. I am not talking about the time you stepped on the west track. You say that when you were still on the east track, after the Woodside car had gone on, you looked up to the north; you looked for a car coming down and could not see any? A. Yes, sir.

Q. I am now asking you what there was to prevent you from seeing the car on the west track coming down, if there was one coming down; was there any obstruction? A. No, sir.

Q. Mrs. Harten, I wish you would tell us how it was that you stood on the east track, and looked up, and did not see a car, if there was one there, when the track was clear for three or four hundred yards; how could that happen?

(The witness did not answer.)

24 Q. Can you explain that? A. I didn't see the car.

Q. Is there anything wrong with your sight; your eyes were good, weren't they? A. Yes, sir.

Q. Your eyes were all right. Now, you said the cars were in the habit of stopping opposite your house? A. Yes, sir.

Q. That was only when some of your family were on board, was it not? A. Not for us alone, but for other people.

Q. When anybody wanted to get off there they would stop? A. Yes, sir.

Q. If nobody wanted to get off there they would not stop? A. No, sir.

Q. It was not a regular stopping place, except when some one wanted to get off there? A. No, sir.

Q. There is no crossing there, is there—a street crossing? A. There is a lane right at the end of our house.

Q. At the end of your house? A. Yes, sir.

Q. At the north end or the south end? A. The north end.

Q. That is beyond where the car stops? A. Yes, sir.

Q. How far does that lane run up that way? A. Not far.

25 Q. You had not gotten to this lane when you got off, had you? A. Not quite.

Q. The car had not gotten to that lane?

The COURT: Is that the lane that goes up to her house?

Mr. DARLINGTON: She says the lane goes up by her house, at the end of her property.

By Mr. DARLINGTON:

Q. Do you remember what you were thinking about when you got off the Woodside car—what was in your mind? A. No; I don't know exactly what I was thinking about. I was thinking about going over to my house.

Q. Do you remember what happened to be in your mind—what you were thinking about? A. Well, I thought of looking out for the car coming down.

Q. You were thinking about the car and looking out for the car?
A. Yes, sir.

Q. Who was on the rear platform of the car on which you had been riding? A. The car I got off of?

Q. Yes. A. Nobody but the conductor.

Q. Did you pay any attention to what he said to you when you told him it was a warm day? A. No, sir; he didn't say anything.

Q. He did not say anything? A. No, sir.

Q. He made no answer to your remark? A. Not that I heard.

26 Q. You had known him some time, had you? A. Yes, sir; I had known him.

Q. He was an affable, polite kind of man, was he? A. Yes, sir.

Q. Had you ever spoken to him before and not gotten any answer?
A. No; not that I know of.

Q. This time you spoke to him and got no answer? A. I just said, when I was getting off the car, that we were going to have a warm day, and I didn't hear what he said.

Q. You did not pay any attention to what he said? A. No, sir.

Q. He said something, did he not? A. I didn't hear him say anything.

Q. You did not hear him say anything? Did he not tell you to look out for a car coming down the other track? A. No, sir.

Q. Did he say anything at all? A. No, sir; not that I heard.

Q. He gave no answer? A. No, sir.

Q. You did not hear the sound of his voice? A. No, sir.

Q. He was there alone on the car? A. Yes, sir.

Q. Doing nothing? You made a polite speech to him, and he simply did not answer you at all. Is that the fact? A. Yes, sir.

Q. Did you think that was strange, that he would not answer you? That had never happened before, had it? A. Not
27 that I remember.

Q. Did not that attract your attention? Did you not think it was strange that he did not make any reply to you at all? A. Oh, no; I didn't pay any attention to it.

Q. How wide is the road there? A. I couldn't exactly say.

Q. It is the Seventh Street road, is it not? A. Yes, sir.

Q. A pretty wide road? A. It is pretty wide now. It wasn't then.

Q. It has been widened since, has it? According to your best recollection, how far is it from the east track of the road over to the fence, which you say is back, behind you? A. Not far.

Q. Could you tell us in feet about how far it is? A. About a couple of feet, I think.

Q. Only a couple of feet? A. About that.

Q. Is there not a wagonway for wagons over on the east side of the track? A. No, sir.

Q. There was not? A. Not at that time.

Q. All the wagons had to come on the west side? A. Yes, sir.

Q. Were you thinking about bells as you crossed the track?

Were you thinking about bells or listening for them as you crossed the track? A. I thought if there was a car coming there would a bell ring.

28 Q. But you looked up the track and saw none? A. Yes, sir; I saw none.

Q. So you were looking for bells, or thinking about them, were you?

(The witness did not answer.)

Cross-examination.

By Mr. BAKER:

Q. Mrs. Harten, when you first alighted from the car you had been on the Washington, Woodside & Forest Glen car, had you not? A. Yes, sir.

Q. And you got off at the rear end of the car? A. Yes, sir.

Q. Now, what did you immediately do, or do after that? A. The car started, and I started across to my house.

Q. As soon as the car started you started across? A. Yes, sir.

Q. Now, when did you first look? A. I looked when I got on the track.

Q. When you got on which track? A. The track between the two cars.

Q. There is no track there, is there? You mean when you got between the two cars you looked? Taking this diagram and taking these as the two tracks, you told Mr. Darlington you got off about here (indicating). Then, when this car started, you say you started to cross? A. Yes, sir.

Q. You said when you were on this east track you looked. Is that right? A. On the east track?

29 Q. Yes. A. I looked up as far as I could see if the car was coming.

Q. When you got over in here (indicating between the two tracks) did you look again? A. Yes, sir; when I was crossing on that track.

Mr. DARLINGTON: You mean between the tracks?

Mr. BAKER: Yes; I mean between the two tracks.

The WITNESS: When I was crossing on that (indicating) I looked, and I made another step, and the car struck me.

By Mr. BAKER:

Q. When you got between the two tracks you looked again? A. Yes, sir.

Q. You looked down here and you looked up this way to see whether a car was coming? A. Yes, sir.

Q. And you could see up this way three or four hundred feet, could you not? There was nothing to obstruct your view, was there? When you got here, between these two tracks, and looked up this other car was not in your way at all, was it? A. When I

got upon this track here I stepped off and struck this track and then came down here (indicating).

Q. What I want to know is this: You testified that when you stepped in between the two tracks there was four or five feet space in between the two tracks? A. No, sir; only four.

Q. When you got in between the two tracks I want to know if you looked up? A. Yes, sir.

30 Q. Now, there was nothing in the way to obstruct your view, was there?

(The witness did not answer.)

Q. Was there anything in the way? A. When I stepped here I looked up, and the car——

Q. No, no; you say when you were here you looked up? A. Yes, sir.

Mr. DARLINGTON: As you are making a record, perhaps you had better designate the points so that the stenographer can take them down.

By Mr. BAKER:

Q. When you were clearing the line of the east track you looked up? A. Yes, sir.

Q. And what I want to know is, when you got in between the two tracks—— A. I looked up, just like that (indicating); and I didn't see nothing.

Q. What I say is, when you were——

Mr. FORREST: Let her finish her answer.

The WITNESS: I looked up, and I made a step, and I looked up, just like that, and I didn't see nothing, and I made another step, and the car struck me.

By Mr. BAKER:

Q. I want to know, now, if you were in between these two tracks and looked up, whether there was anything to obstruct your view. A. No; there wasn't anything to obstruct my view.

Q. There was nothing to obstruct your view. Now, how long after you looked up was it before the fender of the car struck you? A. On the moment——just when I made another step.

Q. What sort of a day was this, Mrs. Harten? A. A very warm day.

Q. It was a clear day, was it not? A. Yes, sir; very warm.

Q. Was the car of the Washington, Woodside and Forest Glen railway an open car, a summer car, or not? A. It was a closed car.

And on redirect examination said witness testified that as soon as she got off the car it started off, but she could not tell how far it had gone when she was passing between the two tracks; that the lane that she spoke of is a public lane, used by the public as such, and

leads out on Rock Creek road over on the other side to go to the Zoo; that she was questioned as follows:

Q. And how far was this lane from where this car stopped? A. About as far as from here to the door (meaning the door of courtroom), I guess.

Q. As far as from you to the door? A. Yes, sir; in or about that.

Q. You were asked something about the conductor speaking to you before you got off the car, and whether he told you to look out for the car or not? A. No, sir.

Q. Had any conductors on the road ever told you before that time to look out for the car when a car was coming? A. Yes, sir.

Q. Did any one tell you on this occasion? A. No, sir.

32 And thereupon the plaintiffs further gave evidence tending to show by one WILLIAM GLOVER, a witness for the plaintiffs, that at the time of the accident to female plaintiff witness was standing in front of place of plaintiffs at the pump and saw her coming up in the Woodside car going north; that he saw the car come to a stop about 35 feet from him and saw her get off; that witness was going to get a bucket of water at pump, and she started over towards her house and was coming across the track; that he was going in with her; that by the time he got through with water she was going down the road on the front of other car going south on the fender, and was carried 40 or 50 feet; that he did not see Brightwood car, as he had his back towards it; that he did not hear any signals given or bells rung; that he knows Mr. Kelly, who lives at Brightwood about a half a square from the plaintiffs' house; that she was taken off the car 5 or 6 or 20 feet north of Kelly's.

On cross-examination he testified that the pump owned by plaintiffs was in the yard on the side of the road; that there are three doors to Harten house; that pump was between the bar-room door and parlor door; that he was standing by fence when car stopped, but not pumping water; saw the Woodside car start and saw her get off the car: first knew of the Brightwood car when it passed him; that he had his back to it, but saw it as it came alongside of him; and thereupon witness was asked the following questions and made thereto the following answers:

Q. But you did not hear any car bells that morning until this accident occurred? A. I did not hear any at all.

Q. You did not hear any at all that morning at any time?

33 A. No, sir.

Q. On any car? A. No, sir.

Q. How far were you from the Woodside car when it stopped? A. Across the street, I guess about thirty feet.

Q. And you are quite sure that you did not hear any car bells that morning until after the accident? A. No, sir.

Q. You did not hear the Woodside car bell ring to stop or to go? A. I heard the bell ringing to give them warning to go ahead, and that is all.

Q. Why did you tell us that you had not heard any that morning, then? A. Well, you said the bell; the only bell I heard was when I heard the fellow pull the bell with the string.

Q. I asked you distinctly, three times over, whether you heard any bell on any car that morning, and I asked you how near you were to the Woodside car when it stopped and started. You said thirty-five feet away. I asked you whether you heard any bell on any car that morning and you said no. Do you wish to modify or change that? A. That is a bell, isn't it? Is that a bell?

Q. What? A. That.

Q. What? A. I say that's a bell, isn't it?

Q. I cannot hear you. A. I say that is a bell.

Q. What is? What is a bell? What do you mean? A. That is a bell that you pull with a string?

Q. Yes; you told us that you did not hear any bell that morning until after the accident. Was that correct or not? A. I don't know. That's the only bell I heard.

Q. But you told us you heard none at all. A. Well, I thought maybe you meant the gong bell or something of that sort. I heard that little bell ring. That's the only one I heard.

Q. Let us try to understand each other about this matter. You say that you first knew that the Brightwood car was coming down that road when it passed you, so that you could see it? A. I said I knew it—no, sir; I didn't see it.

Q. When did you first know that the Brightwood car was coming? A. When it passed me.

Q. When it passed you? A. Yes, sir.

Q. When you saw it? A. Yes, sir.

Q. You did not hear the noise of it until it got to you? A. Oh, I didn't pay no attention. I thought it was the Woodside car going up.

Q. You think you would have heard a bell if it rang, but you did not hear the noise of the car coming until after it passed you? A. Well, I thought it was the Woodside car. I wasn't paying any attention.

35 Q. But you knew the Woodside car had stopped and had then started up again? A. Well, I know, but I wasn't looking for no car down.

Q. You were there about two months, Mr. Glover, were you? A. No, sir.

Q. I say you were at Mrs. Harten's, were you, about two months altogether? A. Yes, sir.

The witness further testified that the cars passed plaintiffs' house every fifteen minutes; could hear a car coming half a square off and sometimes a mile; some make more noise than others; that the cars are trolley cars; that when he last saw her she was coming towards witness, moving towards west track, and next saw her again as she was going down the road on the open summer car; that he could see the lady's clothes from where he stood as she was on the car going down the road; heard no bell ring at all at any time ex-

cept starting bell of Woodside road; that he pumped a bucket of water between the time he saw her standing there, coming across the track, and the time he saw her going down the track.

And thereupon the plaintiffs further gave evidence tending to show by one HENRY DARLING, a witness for the plaintiff-, that he was a physician, and had been a doctor for 33 years, practising for the last twenty years in this District at Brightwood; that he had known the female plaintiff for three or four years and in the summer of

1898 attended her for the injuries received through this
36 accident, seeing her first on Sunday, the 31st of July, 1898, at her home; that she was then lying on her bed, and he made a physical examination and found that the right leg was broken between the knee and the ankle, the lower third of the tibia was fractured, knee bruised, and the hip very much bruised; that the fracture was a simple one, about 6 inches above the ankle; that she had several contusions, one about the head and then at the knee; that he attended her with Dr. J. Ford Thompson for about 8 weeks, during which time she had the leg in plaster Paris, and then saw her frequently after that, for some months, occasionally; that the fracture was set on Monday; that at the expiration of the eight weeks the plaster Paris cast was taken off, the leg bandaged, and used liniment to rub it with; that she was on her crutches for three or four months after that; that she consulted him frequently since the accident, and saw her four or five days ago; seemed to be suffering very much with her leg, and limped considerably; that he has frequently prescribed for her for the pain, and gave her liniment to rub her limb with; that the arm and hip were bruised or contused.

And thereupon the witness was asked the following question by the attorney for the plaintiffs:

Q. And have you since that time treated her or done anything on account of her arm or hand? And answered: Nothing more than the same as I have for the leg. She has complained of the arm.

And thereupon the following proceedings were had:

Mr. DARLINGTON: One moment, Doctor. The court has ruled out the complaints?

37 The COURT: Yes; any complaints that she made subsequent to the original treatment—the first treatment—would not be evidence.

The WITNESS: I can only write a prescription on complaints of the patient.

The COURT: That is all right for a prescription, but anything she said to you, any complaints she made after the original treatment, when you were first called and dressed the wound, would not be evidence.

Mr. FORREST: As to so much of your honor's ruling as excludes complaints, and what he did in respect thereto, we note an exception.

The COURT: I do not exclude what he did in respect thereto. I

only exclude the declarations made by her to him a few weeks ago, subsequent to the original treatment.

Mr. FORREST: As I understood the physician, if the court please, he has said that since that he has treated her off and on down to as late as about a week ago.

The COURT: I do not know what you understand.

Mr. FORREST: I merely want to place before the court what my recollection of the testimony is. Of course your honor can say whether the court differs with me and what your honor's ruling is.

The COURT: I do not recollect anything about the testimony at all.

Mr. FORREST: I only want to get on the record, if I can, my specific objection and an exception to your honor's ruling. That is all that I desire.

Mr. DARLINGTON: What do you object to, Mr. Forrest? Let us understand that.

Mr. FORREST: I want to state my reasons to the court. I
38 do not want to be interrupted all the time while I am trying to state my reasons to the court as well as I can.

The witness has said that complaints were made to him, and that in response thereto he gave certain treatment. I simply say that so far as your honor has ruled out those complaints I desire to note an exception.

The COURT: Certainly; you have an exception to the ruling out of the complaints.

And to the ruling and holding of the justice presiding in sustaining the objection of the defendant's attorney to said complaints and ruling out the same the plaintiffs, by their attorneys, then and there excepted, and the exception was noted by the justice presiding on his minutes before the jury retired to consider of their verdict.

After the noting of said exception making the same a part of the record, and which is also made a part hereof, the witness further testified that he thinks she will suffer with pain for a good while to come; she may eventually get over it.

And thereupon the plaintiffs further gave evidence tending to show by one EDWARD C. WINEBERGER, a witness for the plaintiffs, that he resided in Prince George's county, Maryland, and in July, 1898, resided in Maryland; that he remembers the occasion of accident to female plaintiff in July, 1898; that he was on the car, about ten o'clock in the morning, going south, that struck her, sitting about the fourth seat from the rear of the car; that the first that he remembers of the accident was seeing the motorman putting on the brakes, and did not know what was the matter with him; that the car was then a little below the Harten house;

that his attention was called to the fact that the motorman was
39 putting on the brakes by the sudden slacking of the car.

Before that time witness was smoking and not paying much attention to the car; that there were two passengers besides himself and the motorman and conductor on the car; that the conductor

was on the rear end of the car; that when the car came to a standstill he jumped off to see what was the matter and saw female plaintiff lying in the fender; that the car was then below the Harten house about the distance between two trolley poles; that the car on which female plaintiff was on fender was not quite opposite the Kelly house, but in the neighborhood; did not pay strict attention to where it was; that he saw the north-bound car stop along in front of the Harten place before witness got to it; that the car on which witness was was north of the car when he noticed it; that witness was looking in that direction; that the car stood there a couple of minutes before witness' car got to it; that it is a downgrade towards Brightwood; that the grade goes up to the cemetery and it there slopes both ways; that prior to the time when motorman was putting on the brakes had not heard anybody say anything or holler out or hear any warning of any kind to anybody prior to that time.

And on cross-examination said witness testified that he judged that the car went about the distance between two trolley poles after the motorman put on the brakes; that the distance was in the neighborhood of a hundred feet, but that he could not swear positively that the car went a hundred feet; that he could not tell how fast the car was going, but that he was approached twice in regard to the railroad accident and gave no satisfactory answer; that he was asked how fast the car was going and he replied that he
40 had no stop-watch; that Mr. Hoover approached him twice in regard to what he knew about the case, and that he told him he did not know anything about it, and further that he didn't want to have anything to do with him, and that he would not tell anything that would be a benefit to either side unless he had to; that he had a conversation with Doctor Stone in regard to the matter, and that *and that* he does not remember whether he told Doctor Stone he knew nothing about the case, and that he might have told Mr. Hoover that the road would not do anything for him; that he had been to the court-house twelve times in this case, and in no one of these occasions did he ever speak with counsels on the other side and tell them what he knew about the case.

And thereupon the plaintiffs further gave evidence by one JOSEPHINE KELLY, a witness for the plaintiffs, tending to show that she was eleven years of age; lived at Brightwood; knows where Mrs. Harten lives, not far from her house, about a half a square; remembers the time when Mrs. Harten met with an accident; that she was at her gate at the time; that she saw female plaintiff coming up in the car, on the west side of it, and she got off the car to go across the track, and the car came down, struck her, and knocked her in the fender; saw the car when she was struck by the fender, and saw her struck, and she fell into the fender; that at the time — struck her it was in front of the Harten house; did not see car coming down before it struck her, and did not see it until it struck her; that after getting off car she saw female plaintiff start to go to her house; that

at that time she did not see any car coming down from up the road ;
 41 that she did not see car until it struck her ; that after car
 struck her it went about 40 or 50 feet ; that the gate at which
 she was stopping was south of her house ; that when the car
 that struck the female plaintiff stopped it was from about this end
 of the road to the other ; that at or about the time that car struck
 plaintiff witness did not hear any bell sound, nor did she hear any
 gongs from the car ; that she did not hear anybody say anything ;
 that after the car stopped the motorman and witness' father picked
 her up off the fender and took her into the house ; that at that time
 witness' father was in the ^{yard} ~~house~~ and witness called him.

And thereupon, on cross-examination, the witness testified that
 after the car struck the female plaintiff it went about as far from
 witness as to the post there (indicating) ; that the car that struck
 Mrs. Harten, when it stopped, was two hundred feet, or something
 like that, from witness ; that witness had been standing at the gate
 about five minutes and did not hear any bell or any gong sound,
 and she was standing there when the Woodside car came up and
 when the Brightwood car came down ; that she saw the Woodside car
 stop at Mrs. Harten's, then go on, and it didn't stop until the plain-
 tiff was struck by the fender, and all that time—during which time
 one car stopped and started off again—she heard no bells nor any
 gongs. When standing out in front of her father's house she can
 see up the road as far as the cemetery, but not beyond it ; that it is
 a good deal farther from the Harten house to the cemetery than it is
 from her house to the Harten's.

And thereupon the plaintiffs gave further evidence by one JAMES
 KELLY, a witness produced on their behalf, tending to show that he
 resided on Brightwood avenue, and was the father of Josephine

42 Kelly, and on Sunday, the day the accident happened to the
 female plaintiff, he found the latter sitting on the track in
 front of the car, with her right knee pressing against the
 fender and the motorman supporting her in a sitting position ; that

he found her about 210 or 215 feet from where ^{my} ~~his~~ daughter stood
 and about 45 or 50 feet from the private entrance to her house ; that
 her face was facing west, and they had taken her out of the fender
 of the car and she was in a sitting position ; that he was in the yard
 back of his house when his daughter called to him that the plaintiff
 was on the fender of the car, and witness went out and raised her up
 in his arms, and the motorman assisted him with her as far as the
 stairway in the house leading upstairs, and witness carried her up-
 stairs and laid her in bed, and with every step that witness made
 with her she complained of her leg, "Oh, my leg!" the whole time ;
 that the distance from fence to fence of the Harten premises to wit-
 ness' is about 200 feet—that is, between the houses.

And thereupon, on cross-examination, the witness testified that

standing in the road in front of his house he could see as far as the Battle Ground cemetery, about a square and a half or two squares, or it might be 400 feet; that it is a greater distance from Harten's house to the cemetery than it is from witness' house to Harten's, though not twice as far; and thereupon witness was asked the following questions and made the answers thereto:

By Mr. DARLINGTON:

Q. Is there anything in the grade to obstruct the view between your house and the cemetery? A. It would be if there was a car in the way and I was standing on the track.

Q. The car would be in your way? A. Yes, sir.

43 Q. But I mean is there anything to prevent your seeing a car if you stand in front of your house looking towards the cemetery. If there was a car there, you could see it, *would* you not? A. Yes, sir; I could see it.

And the witness further testified that if he was standing in between the tracks and his attention was called up this way (indicating), of course, naturally, he would see a car coming down, but if he got off this car and started right in there (indicating) and the other car was coming down, it is impossible for a man to get off the car and see a car coming this way (indicating), and that if he was standing on the east side of both cars then the car on the east track might obstruct the view of the car on the west track if they were very near together, but if he was standing in the middle of the track and looking up (indicating) there is nothing to prevent his seeing a car on the west track, but if he was close enough to it he would get out of the way; that if he was standing between these tracks (indicating) and looking up that way (indicating) there is nothing to prevent his seeing a car anywhere on the west track; that there is nothing in that situation which would make the car on the east track interfere with his seeing a car on the west track if he was standing between the two tracks; that if he stopped still between the two tracks and looked there was nothing to interfere with his seeing a car on the west track, but if he saw the car he would want to get out of the way.

And thereupon the plaintiffs further gave evidence by one THOMAS O'BRIEN, a witness produced in their behalf, tending to show that in July, 1898, he was superintendent of the Brightwood railway, and he remembers the occasion of the accident to the female plaintiff, Mrs. Harten; that he was on the car that she got off, the Woodside and Forest Glen car, and was standing on the front platform of said car; that Joseph Irving was the motorman of the car, and George Osborne the conductor; that, standing on the front platform of said car, the witness saw the Brightwood car coming south and running not over ten miles an hour; it was not going very fast, but he cannot say that it slack-

ened its speed at any time ; cannot say that it did ; that witness saw her when he got on the car, as he passed through the car spoke to her, and then he went out on the front platform ; that the car stopped right about in front of Mrs. Harten's house ; that as the Brightwood car neared the car on which he was a passenger he could not say whether any signal or warning was given of its approach, and could not say whether the bell was ringing or not, or whether he heard any bell ; that he heard so many that he couldn't tell five minutes afterwards ; that he does not remember anything unusual in the approach of the Brightwood car towards the Woodside car ; that Henry Trede was the motorman on the Brightwood car ; that as superintendent at that time of said railroad he investigated the accident ; that the distance between the two parallel tracks in July, 1898, was five feet, and the body of the closed cars extended out over the track about two feet—that is, to the extreme outside of them ; that the open car has a running board that comes out about fourteen inches—that is, the outer edge of the running board ; that if two cars were running on these parallel tracks a man might stand sideways and go through, but witness doubts if he could stand that way and pass them ;
45 that at the time of the accident the car on which he was riding was a closed car, and the other one was an open car, and the space between the two tracks was exceedingly narrow ; that after the accident the Woodside car stopped to let witness off very near the cemetery, and after Mrs. Harten left the car witness expects that they had gone possibly a hundred or a hundred and fifty feet before the conductor told witness of the accident, and then witness had the car stopped and got off and went back to the scene of the accident ; that the grade is about a foot in a hundred—a mild grade—from the cemetery to the Harten house.

And the said witness, on cross-examination, further testified that he learned of the accident from the conductor, who came through and told him, and when witness got off the car he must have been two hundred feet from the scene of the accident at the time ; that when witness first saw the Brightwood car it was right in front of the cemetery, about 400 feet from the Harten house ; that there was no difficulty in witness seeing it ; that to make the extreme narrow space between the two cars on the two tracks they would have to stand right side by side ; that the Brightwood car passed the car on which witness was about the time they started up, and he does not think they had gone twenty feet, and possibly not that far, as he could not tell ; that there is a difference in the length of the cars, some of the closed cars being 21 feet and some 29 feet ; that the car coming south, the open car, was 29 feet over all, that if a person was standing between the tracks, there would not be anything to prevent a person seeing the south-bound car—seeing a long distance ; that there would be no difficulty in a passenger who steps off a north-bound car over on the east side and
46 waits until the other car, south-bound, about passing, moves on, seeing a south-bound car if he looks ; that when witness

got there the Brightwood car was 50 or 60 feet south of the Harten house; that at the time it stopped to let Mrs. Harten off it stopped right in front of the house; that the motorman's name was Trede on the Brightwood car, whom witness saw at the scene of the accident, but he does not remember telling Trede that he heard his bell before the accident happened; that witness did not tell Fritz Trede, the brother of the motorman, that he heard the latter ring his bell before the accident; that he remembers that he did not tell him that; that witness did not recollect hearing the ringing of the bell immediately after the accident, and if he had he would remember it yet.

And the said witness thereupon, on redirect examination, testified that if he was behind the Woodside car, just as the car had passed away from him and started towards the west, that he could not see a car coming south, could not see through the car, that it would be impossible; that the car that witness was on was a box car, closed car, and witness could not see through it; that it was witness' duty as superintendent to learn how the accident happened, and if he had heard the bell ring it would have been witness' duty to the company to have so reported to the company; that in pursuance of his duty witness saw the motorman of the car with a view to learning about the ringing of the bell.

And thereupon the plaintiffs further gave evidence by J. FORD THOMPSON, a witness produced on their behalf, tending to show that he was a physician and had practised for a little over 30 years and

47 made a specialty of surgery during fifteen years; that he attended the female plaintiff in consultation with Doctor

Darling, her family physician; that she had a fracture of the leg, the tibia, about three or four inches below the knee; that he put on several plaster dressings, plaster casts, and then he dismissed the case, as witness supposed, well; that the female plaintiff was well, so far as witness could see, excepting that she limps considerably.

*A. She had a fracture of the leg, about three or four inches below the knee—a fracture of the principal bone of the leg, the tibia. I put on several plaster dressings, plaster casts, and dismissed the case, as I supposed, well. She was well, so far as I could see, excepting that she limps considerably, and she tells me she is——

MR. DARLINGTON: One moment, Doctor. The court has ruled in this case that what she tells you is not evidence.

THE WITNESS: That does not count?

MR. DARLINGTON: No, sir.

THE COURT: Anything she said, Doctor, when you were dressing the leg at the time of the original injury—that is, any complaint of pain or how it affected her—would be evidence; but nothing that she said subsequent to that would be evidence.

THE WITNESS: Yes; oh, well, there was nothing especially about it at the time. Everybody complains of a fractured limb.

MR. FORREST: I will reserve an exception, if the court please, to the exclusion of that testimony.

And the said exception was noted by the justice presiding on his minutes before the jury retired to consider of their verdict.

48 After the noting of said exception, making the same a part of the record, and which is also made a part hereof, the said witness further testified that he considered the limb well; that it was united, but the female plaintiff still limps some, though witness did not find any special reason why she should; that the limbs were proper length; that the limping that witness noticed might be attributed to the fractured limb, though witness is not clear about it; that the result seems to be perfect, as far as any inspection or examination goes; that the female plaintiff was pretty badly bruised up according to witness' recollection, though there was nothing that required any special surgical treatment except the fracture; that the limb was in plaster Paris at least eight weeks, and after taking that off a second dressing was put —, and about the time it ought to be perfectly well it had not very solidly united; that witness remembers applying another one, but he has forgotten whether he took that off or whether Dr. Darling did.

And thereupon the said witness, on cross-examination, further testified that the fracture was in the upper third, perhaps in the lower portion of the upper third; that that is where the tenderness was; that if the fracture was in the upper third there is not any possibility of callous being formed in the lower third; that witness only made out a fracture of the tibia, but one bone was just as bad as both in the leg; that the union was quite slow.

And thereupon, on redirect examination, the said witness testified that the bone did not unite as rapidly as witness expected; that what is feared in these cases is a ununited fracture, but witness did not see any evidence of any complication from callous; that he took her to be a woman of forty years of age.

49 The plaintiffs thereupon announced their case as closed.

And the above testimony as set forth being all of the testimony in the case, the defendants, by their attorneys, then moved the court to instruct the jury to find a verdict for the defendants on the ground that the plaintiffs had failed to make a case, and that the female plaintiff was guilty of contributory negligence, and that neither of the defendants was guilty of negligence; to which motion the plaintiffs, by their attorney, then and there objected; but the justice presiding overruled said objection, and thereupon held and instructed the jury as follows:

I do not think I will trouble you any further, Mr. Darlington. If the case here were merely one of one car approaching another (whether they both belonged to the same company or not), and one had stopped, evidently for the purpose of taking on or letting off a passenger, as must have been patent to the motorman of this car that did the injury, it would then be a fair question of fact for the jury as to whether the persons in charge of the car running down there at the usual rate of speed would not be guilty of negligence if they did some injury; but it is not necessary to determine that

question, for, admitting for the moment that they were negligent in running down there at the usual rate of speed, without sounding a
anything *

gong or bell or *something* of that sort, we have here, it seems to me, precisely what occurred in the Hurley case, except that it is a case worse for the plaintiff than the Hurley case.

50 In the Hurley case the plaintiff was standing on the east side of 14th street. He saw a car coming from the north and thought he could cross. He started to cross, and before he had reached the eastern rail he saw a car going north on the eastern track. He concluded, however, that he could pass between them and started to do so. He passed in front of the car going north with safety, but when he reached the west track he stepped onto the track immediately in front of the car—it was a horse car in that instance, I remember—and he stepped on so that the shoulder of the east horse struck him and knocked him down. That was the Hurley case.

In that case, there being two cars going in the opposite directions, and the plaintiff starting to pass between them, and his attention being distracted from the car that hurt him by the other car, it might have been said that it was a question of fact for the jury to determine whether under the circumstances he used reasonable care; but it seemed to me in that case that a man starting to cross between two cars in that way took the chances. If he did; if he started to cross in front of one, why, he took the chances, of course.

Now, this plaintiff was not a passenger evidently, as in the Lusby case. In the Lusby case the plaintiff was a passenger all the time, although she got off of one car and was going to get on another. She was simply changing from one of the cars of the defendant to another car of the defendant. The company had such an arrangement there that it was necessary for a person, in order to get a transfer, to pass across the track upon which the car was running that injured the plaintiff at that time, and her attention was diverted

51 to getting a transfer in obedience to the regulations of that company, and it was a fair question of fact for the jury in that case as to whether her attention was not diverted from avoiding that car coming down there by the very regulations of the company itself, and while I think the jury in that case found against the weight of the evidence, still it was a question for them, and the verdict stood.

This plaintiff was not a passenger on either of these cars; certainly not on the car that injured her. She got off of a car going north, and the car going south was run by a different company, which was not connected with the company which was running the car from which she alighted. The moment she alighted from that car and was in the street, detached from the car, she was no longer a passenger on that car. The company had performed its whole duty and landed her safely. She started to go across, and I cannot see that

she was in any different situation at all to the Brightwood Company than if she had never been upon the other car and had not alighted from it at all, but was simply a pedestrian going along the street, who desired to cross from one side to the other. If that be so, of course it puts her in precisely the situation of Hurley, in the Hurley case.

Undoubtedly the lady thinks she looked. Of course, when persons receive injuries of that kind their minds are a good deal disturbed by the accident, and just what did occur immediately before must be somewhat confused. I have no doubt she thinks she looked for that car; but, of course, we all know she did not look. It would not be reasonable to permit a jury or anybody else to say that a person looked for the car which injured him or her, and then stepped immediately on in front of it. That is precisely what occurred in that Maryland case. The party there said he looked and listened.

52 The court found that he did not, and would not let the jury pass upon that question. Why? Because it would have been unreasonable to permit a jury or anybody else to find that a party looked and listened for danger, and then stepped immediately into it. That is not human.

As I said before, I have no doubt the lady thought she did look, but her mind was evidently preoccupied by something else. She got off that car, and after it passed on, without stopping to think, almost, of a car coming in the other direction, she stepped right on in front of it, and, as she says, she was struck when her foot was on the eastern rail of that western track. I think it must be held by all means that she was guilty of contributory negligence, and it is utterly immaterial whether the defendants are guilty of negligence or not. The jury must therefore return a verdict for the defendants.

To the ruling of said justice presiding in overruling the said objection of the plaintiffs and granting the said motion of the defendants, the plaintiffs, by their attorneys, then and there excepted, and the exception was noted by the justice on the minutes before the jury retired to consider of their verdict.

And because the matters hereinbefore set forth are not matters of record, and because the complainants desire to have the same so made of record, so that they may have this case and the rulings therein considered and heard on appeal by the Court of Appeals of the District of Columbia; they request the justice presiding to sign and seal this the complainants' bill of exceptions, to have the same force and effect as if each and every one of the exceptions herein noted and taken had been separately signed and sealed and made part of the record; which request is by the court granted.

53 And thereupon the complainants tender to the justice presiding this their bill of exceptions and pray that the same may be signed, sealed, and made a part of the record, according to

the statute in such case made and provided, which is accordingly done, now for then, this 8th day of October, 1900.

CHAS. C. COLE. [SEAL.]

Settled by consent.

CHAS. BENDHEIM,

EDWIN FORREST,

Att'ys for Plaintiffs.

D. W. BAKER,

J. J. DARLINGTON,

Att'ys for Def'ts.

(Endorsed :) Submitted to court July 2, 1900. A. L. B.

Order Extending Time for Filing Transcript.

Filed Oct. 9, 1900.

In the Supreme Court of the District of Columbia.

HUGH HARTEN ET AL.

vs.

THE BRIGHTWOOD RAILWAY COMPANY ET AL.

} At Law. No. 42449.

For good and sufficient cause shown to the court, it is this 9th day of October, 1900, by the court ordered that the time for filing with the clerk of the Court of Appeals the transcript of record in this cause be, and the same is hereby, extended fifteen days from and after the 13th day of October, 1900.

CHAS. C. COLE,

Asso. Justice.

55 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss :
District of Columbia,

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 54, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 42449, at law, wherein Hugh Harten *et al.* are plaintiffs and The Brightwood Railway Company, a corporation, *et al.* are defendants, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 17th day of October, A. D. 1900.

Seal Supreme Court
of the District of
Columbia.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1027. Hugh Harten *et ux.*, appellants, *vs.* The Brightwood Railway Co. *et al.* Court of Appeals, District of Columbia. Filed Oct. 24, 1900. Robert Willett, clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA.

FILED

FEB 18 1901

Robert Williford
CLERK.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1900.

No. 1027.

HUGH HARTEN and JULIA HARTEN, His Wife,
Appellants, }
vs.
THE BRIGHTWOOD RAILWAY COMPANY, *et al.*,
Appellees. }

BRIEF FOR APPELLEES.

J. J. DARLINGTON,
D. W. BAKER,
Attorneys for Appellees.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1900.

No. 1027.

HUGH HARTEN and JULIA HARTEN, His Wife,	}
<i>Appellants,</i>	
<i>vs.</i>	
THE BRIGHTWOOD RAILWAY COMPANY, <i>et al.</i> ,	}
<i>Appellees.</i>	

This is an appeal from a judgment of the Circuit Court of the Supreme Court of the District of Columbia in favor of the defendants in an action brought for an injury alleged to have been done to the female plaintiff by reason of the negligence of the employees of the defendants.

The declaration alleges that the plaintiffs sue the defendants, The Brightwood Railway Company and The Washington, Woodside and Forest Glen Railway and Power Company of Montgomery County, Maryland, for that, whereas, on the 31st day of July, 1898, and for a long time prior thereto, the said defendant, The Brightwood Railway Company, owned and operated certain cars propelled and run by means of electricity on Brightwood Road or Seventh street extended, and that the defendant, The Washington, Woodside and Forest Glen Railway and Power Company, was also a common carrier of passengers, for hire, and operated along said Brightwood Road or Seventh Street certain cars propelled and run by electricity, and that said cars were operated and managed by the agents of the re-

spective defendants, and that Julia Harten, the wife of Hugh Harten, both of them plaintiffs in this cause, on the thirty-first day of July, 1898, was a passenger on a car of the defendant, The Washington, Woodside and Forest Glen Railway and Power Company, and that said car stopped at a point on said Brightwood Road about one hundred and fifty yards north of the Piney Branch Road, and that said plaintiff, Julia Harten, alighted therefrom and proceeded to pass around the rear thereof in order to cross the south-bound track, upon which track the cars of the said defendants and each of them moved along when going in a southerly direction towards the city of Washington; that the said plaintiff alighted from said car for the purpose of going to her residence, and, after passing around the car from which she alighted and while in the act of stepping upon said adjoining track, and without any notice to her and without knowledge on her part, but through the carelessness and negligence of the defendants, she was struck by an approaching car of the defendant, The Brightwood Railway Company, and was injured, for which plaintiffs claim damages in the sum of ten thousand dollars.

The declaration contained two counts. In the first one an attempt is made to treat female plaintiff as a passenger at the time that she was injured; in the other count there is a general allegation of negligence on the part of the defendants by reason of the same facts without reference to the allegation that plaintiff was a passenger at the time she was injured.

To this declaration the defendants pleaded separately, and, issue being joined on the pleas, the case came on for trial before a jury, and testimony was produced on behalf of the plaintiffs which showed that the female plaintiff got on a car of the defendant, The Washington, Woodside and Forest Glen Railway and Power Company, on

Seventh street, at the boundary of the city, at about 10 o'clock A. M.; that she took a seat in the car, and that the car stopped to let her off right opposite her house; that after it stopped she got off the car, and, after getting off, she went to pass around the rear part of the car to go over to her home; that she got off on the east side; that the conductor knew where she lived, and that after getting off the car she walked around it, and that she looked south or north; that she did not see any car coming; that she went to pass over the west track and the fender struck her and knocked her on the fender; that when the fender struck her her foot had just gotten on the east rail of the track; that when she looked she was passing from behind the car, she looked up and did not see any other car, made another step and the car struck her; that she did not hear any bells or signals from any car nor any warning or halloing.

On cross-examination she further testified that she was pretty familiar with the cars and the road; that she had been riding on them for about three years before the accident; that from where she crossed the track you could see in the direction from which the south-bound car came, beyond the Government cemetery, two or three hundred yards, and that the cemetery was situated about half a square from her house; that there had always been a double track since she had been living out there; that she knew the cars were going up and down on the west track as well as on the east one; that when she got off the Woodside car she got off the east side and took a reasonable time to get across; she waited until the Woodside car started off before she undertook to cross; and, when questioned in regard to her movements after she alighted from the car, the plaintiff, after much equivocation, stated that she waited until the Woodside car moved off and then she

walked slowly and deliberately across the track when the Woodside car was a couple of feet away; that there was a space between the two tracks of about four feet and that when she got in this space she looked and didn't see a car. She further said that she was standing on the east track when she looked to see if another car was coming, and, when asked to tell why she did not see it, she did not answer the question, but upon another question being put to her she said she guessed that the car was coming at such a quick rate that she couldn't very well get out of the way. After again stating that she looked and did not see any car, she was asked, "Was there any obstruction?" and she answered, "No." Then the following question was put to her:

Q. "Mrs. Harten, I wish you would tell us how it was that you stood on the east track and looked up and did not see a car if there was one there when the track was clear for three or four hundred yards. How could that happen?"

(The witness did not answer.)

She further stated that her eyesight was all right and that the place where she alighted from the car was not a regular stopping place nor was it a crossing.

On further cross-examination, plaintiff testified that as soon as the car from which she alighted started she started across to her house and that she looked when she got on the track between the two cars, and, when informed that there was no track between the two cars, she said that she looked again when she was between the two tracks, and, immediately after looking, made another step and the car struck her. The witness was asked what, if anything, there was to obstruct her view when she was standing between the two tracks. She did not answer. Then she was asked again the following questions:

Q. "I want to know now if you were in between these

two tracks and looked up whether there was anything to obstruct your view ? ”

A. “ No, there wasn’t anything to obstruct my view.”

Q. “ There was nothing to obstruct your view. Now, how long after you looked up was it before the fender of the car struck you ? ”

A. “ On the moment—just when I made another step.”

Further testimony was given on the part of the plaintiffs in regard to whether or not any bells were rung, one witness testifying that he did not hear any bells. On cross-examination it was shown that the witness did not hear the noise of the car coming and that he wasn’t paying any attention and that he wasn’t looking for a car to come down the track ; that you could hear a car coming half a square off and sometimes even a mile ; that he did not see the accident, but saw the plaintiff coming across the track after she got off the car.

Further testimony was given to show that the car went about forty or fifty feet after it struck Mrs. Harten and was not running over ten miles an hour when the accident occurred, and Thomas O’Brien, a witness produced on behalf of the plaintiff, after testifying to the speed of the car, said that the distance between the two parallel tracks at the place of the accident was about five feet ; that he was a passenger on the Woodside car, and that after it had gone about a hundred or a hundred and fifty feet he learned of the accident from the conductor and got off and went back. On cross-examination the witness testified that when he got off the car to go to the scene of the accident he must have been two hundred feet from where it occurred ; that when he first saw the Brightwood car it was right in front of the cemetery, about four hundred feet from the Harten house, and that it passed the car on which he was after it had gone about twenty feet, possibly not that far, from the place where Mrs. Harten alighted ; that if a person were standing

between the tracks there would not be anything to prevent him or her from seeing a south-bound car, or seeing a long distance, and that there would be no difficulty in a passenger who had stepped from a north-bound car, on the east side, and had waited until it moved on, in seeing a south-bound car if he would look.

The female plaintiff, Mrs. Harten, testified as to the injuries inflicted upon her and also produced two physicians. An exception was taken to the ruling of the Court in excluding the declarations made by the female plaintiff to her physician a few weeks before the trial and subsequent to the original treatment.

After the plaintiff had rested, the defendants moved the Court to instruct the jury to return a verdict for the defendants. The Court granted this motion; the plaintiffs noted an exception, and the case is brought on appeal to this Court upon this and one other exception taken to the rulings of the Court at the trial.

ARGUMENT.

Upon an examination of the record in this cause it will be perceived that the whole contention of the plaintiffs rests upon the assumption that the female plaintiff was a passenger on the car of the defendant, The Washington, Woodside and Forest Glen Railway and Power Company, at the time that she was injured, and that her injury was occasioned by the joint negligence of the defendants, and that the testimony produced on the part of the plaintiff does not show that she was guilty of contributory negligence.

The first proposition for consideration therefore is, was the female plaintiff a passenger on the car of the defendant, The Washington, Woodside and Forest Glen Railway and Power Company? The testimony shows that she had

arrived at her destination, had alighted in the public road, without any intention of further continuing her journey on said railway, and that the car from which she had alighted had continued on its journey, leaving the plaintiff in a place of safety to go wheresoever she desired. It is insisted that under such circumstances the female plaintiff was not a passenger of the defendant's railway, and that it had ceased to owe her any duty or liability as her carrier.

In the case of *Craemer vs. The West End Street Railroad Company*, 156 Mass., p. 320, the Supreme Court of that State held that where a person steps from a street car to the street, not upon the premises of the railroad, but upon a public place, where he has the same rights with every occupier, his rights are those of a traveller upon the highway and not those of a passenger. In this case, the person had ridden as a passenger upon the car, and after alighting had walked one or two steps and was run into by a car on the opposite track and killed. The court said :

"We are of the opinion that he was not a passenger when the accident occurred ; that he ceased to be a passenger when he alighted upon the street from his car. The street is in no sense a passenger station for the safety of which the Street Railway Company is responsible. When a passenger steps from a car upon a street, he becomes a traveller upon the highway and terminates his relations and rights as a passenger, and the railroad company is not responsible to him as a carrier for the condition of the street or for his safe passage from the car to the sidewalk."

When a passenger on a street car has alighted in a place of safety the relationship of carrier and passenger ceases, and thereafter the railroad company owes him no other duty than what is due to any traveller on a highway, and where such passenger in the daytime attempts to cross a street railway track immediately in front of an approach-

ing car, without looking to see whether another car is near, and is struck and injured, such passenger is guilty of contributory negligence, and cannot recover.

Smith *vs.* Street Railway Company, 29 Ore., 539.

A person, being a passenger on an ordinary street car, who steps from the car into the public street at the place of his destination, ceases to be a passenger the moment he leaves the car.

Platt *vs.* 42 Street Railway Co., 2 Hun., 124.

Booth on Railway Law, Section 326.

Allerton *vs.* Boston and Maine R. R. Co., 146 Mass., 241.

Upon an examination of the declaration, it will be seen that the plaintiffs attempt to bring themselves within the decision of this Court in the case of Traction Company *vs.* Lusby, 12 App., D. C., 295, but on an examination of that case it will be found that they have utterly failed to do so. In the Lusby case one of the questions submitted to the jury was whether or not the plaintiff, at the time she was injured, was a passenger of the Traction Company, *the accident occurring at a transfer station, when the plaintiff was on her way to obtain a transfer and continue her journey.* The jury found in favor of the plaintiff, and this Court held that it was the duty of a street railway, *at its crossings and transfer stations, to protect its passengers.* In commenting upon one of the instructions referring to the accident, the Court said:

"It occurred on or between the railroad tracks of the defendant, and at a station where the plaintiff had just alighted from the car. The principle of look and listen, of general application in the cases of steam railroad crossings, can hardly be applied in its strict sense to the crossings of a street railroad, and therefore it could have no proper application to cases like the present."

In order to bring the female plaintiff within the ruling

of this Court in the Lusby case, it would be necessary first to show that she was a passenger, and that, as a passenger, she left one car at a station or crossing of the railroad company to continue her journey on another car of the same company, and while so doing, she, while herself exercising due care, was injured by a car of the same company.

In this case plaintiff had ceased to be a passenger of the car from which she alighted, she was at her destination, she alighted at no crossing or station but in the public street, she had no transfer but had fully completed her journey, and was injured, not by a car of the company of which she had been a passenger but by a car belonging to an independent corporation, upon which she neither had been nor contemplated being a passenger. It is submitted that the Lusby case has no bearing whatever upon the case at bar, and that upon the authorities the plaintiff was not a passenger of either defendant, at the time that she was injured, and that neither owed any duty to her as a common carrier.

This brings us to the consideration of what, if any, negligence is shown in this record on the part of either of these defendants. It is insisted, in so far as The Washington, Woodside and Forest Glen Railway and Power Company is concerned, that when it had properly delivered the plaintiff at her destination, and especially after, with her knowledge, its car had proceeded on its farther journey, it had fulfilled its obligation, and there is no testimony in the record that shows any negligent act on its part. It did everything that was necessary for it to do when it delivered the plaintiff at her destination, in the public street, and had proceeded on its journey.

The record fails to disclose any act of negligence on the part of the other defendant, The Brightwood Railway Company. The female plaintiff never was a passenger on said

railway, and the said company owed her no duty as such. The relationship between them was that of an ordinary traveller and a railway company. The only attempt to prove negligence on the part of the employees of the Brightwood Railway Company is found in that part of the record where certain witnesses state that they heard no bells rung on the car of said company ; the car was proceeding at the usual rate of speed, and there was no attempt to show, by any evidence, that there was any custom or duty on the part of the motorman on this car to sound his bells at this point.

It is hardly necessary to cite authorities to show the distinction between the duty owed by a carrier to a passenger and the duty owed by a street railroad company to a traveller. This distinction is well settled.

O'Rourke *vs.* Lindell R. R. Co., 142 Mo., 342.

Goll *vs.* Manhattan R. R. Co., 37 N. Y., *super*, 74.

It is insisted, therefore, that the record fails to disclose any act of negligence on the part of either of these defendants.

But the learned Court below held that it was not necessary to determine the question whether or not the defendants were negligent, for the reason that the plaintiff was, upon the evidence adduced on her behalf, clearly guilty of contributory negligence, that she was herself responsible in part if not wholly for the injury, and therefore that she could not recover, and it was the duty of the Court so to instruct the jury.

It is insisted that the record shows affirmatively, in accordance with the ruling of the Court, that the plaintiff was the author of her own injury, and that if she had used due diligence or ordinary care the accident would never have happened.

According to plaintiff's own statement, she walked slowly and deliberately across the east track, across a four or five foot space between the east and the west track, and stepped deliberately on the east rail of the west track, and was then struck by the car coming toward Washington City, and that she did this having in mind at that time that there was danger of a south-bound car passing at the time, and when such a car would have been in plain sight several hundred yards before it could have reached her.

Great stress was laid upon the fact by appellants' attorneys that the female plaintiff *said* that she looked to see if a car was coming down the track. She admitted that she could see four or five hundred feet up the track; that there was no obstruction in the way, and still they said that she looked and did not see the car. The trial court said:

"It would not be reasonable to permit a jury or anybody else to say that a person looked for a car which injured him or her, and then stepped immediately on in front of it. That is exactly what occurred in the Maryland case. The party there said he looked and listened, the Court found that he did not, and would not let the jury pass upon that question. Why? Because it would have been unreasonable to permit a jury or anybody else to find that a party looked and listened for danger and then stepped immediately into it. That is not human."

But suppose the female plaintiff did look: then she must have seen the car. Either she did not look, or, looking, saw it, and recklessly stepped on the track in front of the car. In either case, she would be guilty of contributory negligence.

This very question arose in the case of *Blaney vs. The Electric Traction Company*, 184 Penn., 524. In that case a man fifty-four years of age, in full possession of his senses, left the curb to cross the street just as a car was approach-

ing on the north track. He stopped about four feet from the track, and, as soon as the car passed, without stopping again, started across and was struck by a car running eastward on the south track. The court say :

“ He could have stopped for a second on the track of the car that had just left him westward, or for half that time on the six-foot space between the tracks. If he had done either, he would have been saved ; that is, if the car had been running as argued by the appellee, thirty miles an hour (but this is very doubtful); or if he had lost but a second of time on his way to reach the east-bound track the car would have passed him. What is the unavoidable inference? Clearly one of two : either he did not look for a car coming where ordinary intelligence or care dictates there might be one, or, seeing one perilously near, he recklessly ran the risk of passing in front of it. The argument of the appellee that the west-bound car obstructed his view of the east-bound one is without weight. If he had stopped for a moment on the track to look up, the car on the other side would have passed him ; but whichever of the two inferences in the case before us be correct, both point unerringly to contributory negligence. There was no room on the evidence for the jury to draw a third one, that of ordinary care on the part of the deceased, or ordinary care suggesting that he stopped and looked for a car running east as well as for one running west.”

In the above case, the defendant produced no witnesses, and the trial court submitted the case to the jury on the question of negligence and contributory negligence. The error assigned was that the court refused a peremptory instruction to return a verdict for the defendant, and for this reason the judgment was reversed.

In the case of *The Baltimore Traction Company vs. Helms*, 84 Maryland, p. 515, the Court of Appeals of that State held that where a passenger on an electric street railway alighted from a car, and, passing behind it, walked

slowly upon the next track, where he was struck by a car coming from the opposite direction, he knowing that cars were running upon this track at short intervals, the view being unobstructed, and where, if he had looked, he could have seen the approaching car and could have stopped with safety in the space between the two tracks, not having done so, he was guilty of contributory negligence as matter of law and could not recover.

The plaintiff in the above case testified that, before he alighted from the car, he looked in the direction of the cars that came towards the west and did not see any approaching car, and that he coolly and deliberately stepped right on the west-bound track, as slowly as a man could walk, and that before he knew it he was struck; that he passed around the rear of the car from which he alighted, and that there was nothing to obstruct his vision. Then he was asked if he could see the car, if he had looked, why was it he said he looked too late. He answered, "Because the car was running at such a high rate of speed it got on me before I knew it or before I could realize it." Then he was asked the following questions by the court:

Q. "In your examination in chief, you said that when you alighted from the car you stopped, looked and listened?"

A. "Yes, sir."

Q. "Now, when you crossed behind the car, did you or not make an effort to look?"

A. "I had my head turned toward the west-bound track all the time. I was looking for a car to come but saw none."

The court say:

"The right to recover depends upon two distinct propositions of facts: First, the negligence of the defendant, and second, the exercise of due and ordinary care by the plaintiff, and if he fails to prove negligence on the part of the defendant, or if it appears from his own evidence that

he was guilty of negligence directly contributing to the injury, he cannot recover. Assuming then, as we must from the plaintiff's testimony, that the defendant was guilty of negligence in running its car in violation of the city ordinance at the high rate of speed testified to, was the plaintiff guilty of such contributory negligence as will prevent a recovery? He walked deliberately from behind a street car across a track on which he knew cars were running at intervals of a few minutes. It fully appears from his testimony that if he had looked, he could have seen the car approaching, and that no accident would have happened. If the circumstances are such that one with normal sight and hearing could see and hear, then his duty required him to use his senses to guard against injury by the negligence of others. * * * Whatever may have been the opinion of the plaintiff as to his power to stop and look before crossing the track, the fact is that he did not take this precaution. Nor is there anything in the evidence to show that he or any man with ordinary powers could not have both stopped and looked in time to avoid injury. It does not appear, however, that he made any effort to do either, for he was in the centre of the track before he saw the car. If a witness who can see testifies that he looked, and did not see an object which, if he had looked, he must have seen, such testimony is unworthy of consideration."

And the Court of Appeals reversed the judgment of the trial court on the ground that the latter erred in not instructing the jury to return a verdict for the defendant, the court in conclusion saying :

"One who deliberately walks out from behind a street car from which he has alighted and attempts to cross a public street without using his powers of observation, and is injured by an approaching car, which injury could have been avoided by the use of the most ordinary care, will not be allowed to recover."

In the case of *Busby vs. The Traction Company*, 126

Penn., 559, the plaintiff was a passenger on the defendant's car, moving along on the north track of a double-track cable street railway. He got off the car on the north side, where he was in perfect safety; without waiting for the car to move, or looking to see whether another car was coming, he walked around the rear of the car from which he alighted and started to cross the street. Instead of looking, he stepped on the other track, and was struck by a car going in an opposite direction to the one from which he had alighted.

The court below non-suited the plaintiff on the ground that he was guilty of contributory negligence, and the Supreme Court, in affirming the judgment, said there was a plain disregard of the dictates of the most ordinary prudence, and that there was no room for the jury to be allowed to draw any other inference than that the accident was the result of the plaintiff's own negligence.

Counsel for the appellants cited that part of the decision of this Court in the Lusby case where this Court said :

"The principle of look and listen, of general application in cases of steam railroads, can scarcely be applied in its strict sense to the crossing of a street railroad."

And in the Busby case the counsel for the plaintiff seemed to lay much stress upon the argument that that case was not within the imperative rule for railroad crossings, that the traveller must stop, look and listen. The court said :

"But no such test was applied in the court below to the plaintiff's conduct. On the contrary, it was expressly disclaimed, though the counsel for defendant called attention to the fact that the cars in question were so-called cable cars, whose controlling motive power was steam. But the case was tried below, and must be tested here, upon the

universal rule which requires due and ordinary care in crossing public streets, as in all other transactions of life."

The Court further said :

"The facts in the present case were undisputed. By his own evidence, it appeared that the plaintiff got out on the north side of the car, and was in a place of entire safety ; if he had looked to the right he could have seen the south-bound track, from which alone danger was to be apprehended, for a square or more to the west, except for a moderate space nearest to him where the car out of which he had just gotten would obstruct his vision. If he had waited a moment for the car to move on again, he would have had an unobstructed view of this space. He neither looked nor waited, but turning sharply around the rear of the car started to cross the street. There was still a chance, however, for prudence and care ; the space between the two sets of tracks was four and a half feet, and the overhanging of the cars less than a foot on each side, still leaving room enough to stand in complete safety where a turn of his head would have shown him the whole track he was about to step on. Instead of looking he bolted ahead right into the car, which was upon him at the instant he set foot on the track."

See also *Northern Pac. R. R. Co. vs. Freeman*, 174 U. S., 379.

Doyle vs. Albany R. R. Co., 39 N. Y., Supp., p. 440.

Smith vs. Street Railway Company, 29 Ore., 539.

Fenton vs. Second Avenue Railroad Co., 126 N. Y., 625.

In the case of *Hurdle vs. The Washington and Georgetown Railroad Company*, 8 App. D. C., 120, which was the case cited by the trial court, this Court, speaking of the action of the plaintiff, say:

"The plaintiff obviously placed himself in a position of danger without any excuse or just reason for so doing. He was not required to wait more than a moment for both cars

to pass, when he could have crossed the street in entire safety. And it is inconceivable why he should have attempted to cross as he did, unless he acted in a spirit of recklessness, or of gross carelessness scarcely less culpable"—

this court affirming the action of the Court below in peremptorily instructing the jury to return a verdict for defendant.

From these authorities, it appears that the female plaintiff in this case was guilty of contributory negligence, that there was nothing requiring submission by the court to the jury upon that question, and that, therefore, the court below committed no error when it instructed the jury to return a verdict for the defendants.

Howes vs. The District of Columbia, 2d. App. D. C., 188.

The only other exception in the record is that to the ruling of the court on the question of the admission of certain evidence, which evidence related to the injury sustained by the female plaintiff. Contending as we do that the plaintiffs are not entitled to recover, this question, involving merely the quantum of damages, becomes immaterial. It is sufficient to say that the court restricted the testimony only so far as to exclude statements made by the female plaintiff to her physicians within a few weeks of the trial, and subsequent to the original injuries and treatment. These declarations were self-serving declarations on the part of the female plaintiff, made when it was known that this case was nearing trial, and not made under circumstances precluding a suspicion of misrepresentation and were therefore properly excluded. If the facts stated were material and true, it was for the plaintiff to testify to them on the stand, and not filter them through the minds and memories

of her physicians, without either of the usual sanctions of evidence.

It is respectfully submitted that no error was committed by the trial court, and that the judgment of the court below should be affirmed.

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